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In The

Supreme Court of the United States

October Term, 1994

SIPCO, INC., and MONFORT, INC.,

Petitioners,

v.

FRED G. JENSEN, JAMES J. MONAHAN, WALTER C. CLARK and RICHARD F. KRIEGLER, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Rule 15 of the Supreme Court Rules requires that a brief in opposition to a Petition for Writ of Certiorari point out any perceived misstatements in the Petition. Respondents believe that there are three misstatements contained in the Petition, one of which appears in the "Question Presented" section of the Petition.

The Question as presented implies that *all* plan documents contain a reservation of rights clause. Those are not the facts of this case. Summary Plan Descriptions (SPDs) are without question plan documents. And the SPDs in this case did not contain a reservation of rights clause until after all class members had retired.

With regard to the substance of the Question Presented, Respondents agree with the statement of the issue as framed by the Court of Appeals: "The core issue in this case is whether, when each class member retired, his or her SIPCO retirement medical benefits were vested."* (App. 7)

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* This is an issue of fact and a matter of contract and trust law.

RULE 29.1 LISTING

Respondents suggest to the Court that the statement that "SIPCO is no longer doing business" is evasive, if not in fact misleading.

Petitioners do not tell the court who has succeeded to either the business of SIPCO or the assets of SIPCO.

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STATEMENT OF THE CASE

The second perceived misstatement is found in Petitioners' "Statement of the Case". At pages 4 and 5 of the Petition, Petitioners appear to quote the text of the reservation of rights language contained in the plan and trust documents (Article XVI (Power of Amendment)). The full text of Article XVI is set forth in the opinion of the Court

of Appeals (App. 5). Petitioners omitted that portion of Article XVI which is highlighted below in italicized type:

ARTICLE XVI

POWER OF AMENDMENT

1. The Board of Directors of the Company shall have the right and power to alter, amend, or annul any of the provisions of this Pensioner Medical Plan, *provided, however, that no such alteration, amendment or annulment shall permit any part of the Trust Fund, either corpus or income, to be used for or to be diverted to purposes other than for the exclusive benefit of the Employees or Participants or their beneficiaries.*

2. *An amendment shall become effective as of the date specified in the resolution adopting such amendment. Unless otherwise expressly provided therein, amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment.*

The omission of the italicized text leaves the Court with the incorrect perception that the employer's power to amend was unlimited. The italicized text demonstrates that that is clearly not the case.

Agreeing with the trial court, the Court of Appeals resolved the vesting of benefits issue by concluding "that SIPCO *intended* that its retiree medical benefits would vest when salaried employees retired" (emphasis supplied).

Thus, it is clear that the decisions of the trial court and the Court of Appeals are factually based so that none

of the reasons for a grant of certiorari as stated in Supreme Court Rule 10 are present in this case.

SUMMARY OF THE ARGUMENT

The decisions of the trial court are factually based. There were ambiguities in the plan documents. The issues decided by the courts below are issues of contract and/or trust law.

The attempted attack on the credibility of John Copeland at page 5 of the Petition demonstrates the factual nature of the opinions of the trial court and the Court of Appeals.

There is no conflict among the circuits as contended by Petitioners. The Petition for Writ of Certiorari should be denied.

ARGUMENT

I. The Plan Documents are Ambiguous

Citing *Alday v. Container Corp. of America,* 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied,* 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991) and *Moore v. Metropolitan Life Ins. Co.,* 856 F.2d 488, 492 (2d Cir. 1988), the Court of Appeals held that "SPDs are considered part of the ERISA plan documents" (App. 7). The Petitioners do not contend otherwise.

There were at least two sources of ambiguity in the plan documents which the lower courts were required to construe.

The first ambiguity pertains to the circumstances under which the benefits of the plan may be terminated. The SPDs contained provisions dealing with "Termination of Coverage" that were quite different from those set forth in the formal plan documents. The termination provisions in the SPDs read as follows:

> **TERMINATION OF COVERAGE**
>
> **Children Who Marry or Reach Age 19 –**
>
> All coverage for children ceases on date of marriage or age 19, whichever occurs first.
>
> **Divorce of Spouse –**
>
> All coverage for the spouse ceases on the date of divorce.
>
> **Death of Pensioner –**
>
> Coverage for dependents continues for a period of 90 days following date of death and then ceases unless the spouse is to receive a survivors pension. (App. 6)

These provisions make no reference whatsoever to the termination of coverage in the event the employer chooses to discontinue the plan.

On the other hand, the formal plan documents contained a reservation of the right to amend, alter, or annul *any provision of the Plan*. Significantly, this language does not specifically refer to the right to *terminate or discontinue* the plan. It was only after the members of the class retired that they were notified in writing of the

employer's asserted right to terminate or discontinue the plan. The insertion of this new termination language created the ambiguity and conflict which was, in the Petitioners' words, the "impetus for the class action" (Petition p. 4) and the basis for the decisions of both lower courts.

The courts were required to resolve the conflict between these competing provisions relating to the termination of coverage and did so by construing ambiguous terms in the documents.

The second source of ambiguity in the plan documents is derived from the reservation of rights language found in Article XVI and the reservation of rights clause belatedly inserted in the SPDs. While the reservation of rights provision which was inserted in the SPDs appears to declare an unlimited right to amend, the formal plan document contains very substantial limitations upon the power to amend:

1) No amendment shall permit any part of the Trust Fund to be used for any purpose other than the exclusive benefit of Participants.

2) Amendments shall only become effective on the date of such amendment.

3) Amendments shall not be applicable to persons who are receiving pensions prior to the date of such amendment.

On the basis of those inconsistent and ambiguous statements, the trial court and the Court of Appeals correctly held that the plan documents, including the SPDs, were ambiguous, or that at least they were not facially

unambiguous. The courts were accordingly justified in considering extrinsic evidence.

II. The Opinions were Factually Based and Decided on Contract Law or Trust Law

Having found the plan documents to be ambiguous the courts below correctly considered extrinsic evidence. In doing so, they relied on this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989), quoting *Restatement (Second) of Trusts* § 4 cmt.d (1959).[1]

The courts below then went on to consider extrinsic evidence set out briefly on pages 5 and 6 of the Petition and set out more completely in the Appellate Court's opinion at pages 10 to 13 of the Appendix to the Petition.

With respect to that evidence, the Appeals Court noted that:

1) "SIPCO has nothing to offer". App. 10.

2) "It did not include complete copies of Plan 1006 or Plan 1017 in the record on appeal". App. 10.

3) "SIPCO presented virtually no extrinsic evidence at trial supporting its position". App. 10.

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[1] The third misstatement of the record in the Petition appears at App. 8 where the quotation from *Firestone, supra,* and the *Restatement* contains what may be a typographical error. But the error completely changes the meaning of the quotation. The last two words of that quotation as reproduced in the Appendix are "*now* inadmissible" and should read "*not* inadmissible".

4) "Plaintiffs . . . presented a wealth of extrinsic evidence supporting their contention that SIPCO intended that Plan 1006 and Plan 1017 medical benefits would vest when a Class member retired under either Plan." App. 10.

5) "Given this *overwhelming* extrinsic evidence, we agree with the District Court that SIPCO in creating Plan 1006 and Plan 1017 *intended* that retirement medical benefits for salaried employees would vest when those employees retired." (emphasis supplied) App. 13.

6) "To put the issue in trust law terms, either the reservation of rights provisions in the plan documents must be construed as conferring only a power to modify plan benefits prospectively (that is, for salaried employees not yet retired) or SIPCO *relinquished* the broader power to modify benefits for those already retired." (emphasis supplied) App. 13.

Clearly, this case has been decided on factual questions as a matter of contract or trust law.

Petitioners in their Petition seem to recognize that to be the case when they attempt to attack the credibility of John Copeland, a former SIPCO President and CEO. (See p. 5 of the Petition). Copeland's testimony had been relied upon heavily in the courts below.

But Rule 52 of the Federal Rules of Civil Procedure provides that:

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The attempt to attack the credibility of John Copeland in the Petition accomplishes nothing except to underscore the factual basis of the opinions below.

III. This Decision is not in Conflict with Other Courts of Appeal

Petitioners strive mightily to create the impression that there is a conflict between the decision in *SIPCO* and decisions of other courts of appeal. But this Division of this Brief will demonstrate that there is no such conflict.

The conflict perceived by Petitioners is created primarily by their misperception and various misstatements of the facts of this case. Those misstatements have been pointed out earlier in this Brief.

At pages 10 and 11 of their Petition, Petitioners attempt to compare the reservation of rights language in this case with reservation of rights language in other circuit court cases.

But as shown in the Statement of the Case in this Brief, Petitioners have misstated the language in this case by severely abbreviating or editing the language in this case. When we look at the complete language of Article XVI, we find that it is very different from that of other circuit court cases.

In the first place the language in the SIPCO plan:

1) does *not* include the word "discontinued" as in *Gable v. Sweetheart Cup Co. Inc.*, 35 F.3d 851 (4th Cir. 1994).

2) does *not* include the word "cancel" as in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 196 (1993).

3) does not include the words "terminate", "suspend", or "withdraw" as in *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675 (1991).

4) does *not* include the words "discontinued" or "discontinue" as in *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745 (1989); and

5) does *not* include the word "discontinue" as in *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488 (2d Cir. 1988).

In the second place there was no multi-million dollar trust fund created to satisfy the obligation to pay retiree medical benefits in the cases cited by Petitioners as there is in this case.

And, in the third place, the language in the SIPCO plan contains specific and substantial limitations on the power to amend (noted in Argument II in the discussion concerning Article XVI) for which there is no counterpart in the cases cited by Petitioners.

In none of those cases has the court of appeals held that the language of the reservation of rights clause was ambiguous. In none of those cases was the court concerned with an inconsistency between the formal plan documents and the SPDs, which helped create the ambiguity in *SIPCO*.

The Petitioners also failed to point out that all circuits are in agreement that if there is a conflict between the formal plan documents and the SPD, "the summary shall govern." *Hansen v. Continental Insurance Co.*, 940 F.2d 971 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984); and *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2nd Cir. 1990). As the court noted in *McKnight, supra:*

> "It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet."

758 F.2d at 1570. (This language is quoted in *Hansen, supra.)*

In *Hansen, supra,* the court noted the futility of any other rule by stating at pages 981 and 982:

> " . . . if a participant has to read and understand the policy in order to make use of the summary; then the summary is of no use at all."

Petitioners appear to rely heavily on *Wise, supra,* to establish their perception of a conflict in the circuits. But *Wise* is not in conflict with *SIPCO.* As shown above the language in the reservation of rights clause is different than in *SIPCO.* No ambiguity was found in *Wise.*

Additionally in *Wise*, the Plaintiff class was entirely different than the Plaintiff class in *SIPCO*. The class in *Wise* was a class of those persons retiring *after* the change in the SPDs. That class was a class of those who retired *after* the company announced it would provide benefits only to those retiring before March 1, 1986. In *SIPCO* the class is those persons who retired *before* a similar announcement. In *Wise*, the company continued to provide benefits to those who retired *prior* to March 1, 1986. *Wise*, 986 F.2d at 936.

Petitioners assert that *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d. Cir. 1994), *cert. granted*, 115 S.Ct. 42 (Sept. 26, 1994) (No. 93-1935), provides a reason for the grant of certiorari in this case.

But *Curtiss-Wright* presents an entirely different issue. The issue presented in *Curtiss-Wright* was a procedural question. The procedural question was whether the Plan provided a procedure for amending the Plan as required by § 402(b)(3) of ERISA (29 U.S.C. § 1102(b)(3)). Unlike the SPD in this case, the SPD in *Curtiss-Wright* did clearly and unambiguously provide a right to terminate the plan.

The issue in *SIPCO* is a factual issue. That issue was whether SIPCO *intended* that the benefits vest upon retirement. The courts below held, based upon overwhelming evidence, that SIPCO so intended.

CONCLUSION

None of the considerations for the grant of certiorari set forth in Supreme Court Rule 10 are present in this case. The Plan Documents taken together are ambiguous. The Courts below have resolved factual matters on overwhelming evidence. There is no conflict of Circuit Court decisions.

Accordingly, the Petition should be denied.

Respectfully submitted,

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